Office of the Clerk of the County Court

Wyoming County, W. Va., October 15, 1902.

The foregoing writing together with the certificate of acknowledgment thereof thereto annexed was this day admitted to record in said office.

Teste: C. F. Stewart, Clerk, per A. M. Stewart, Deputy.

Recorded in Deed Book No. 27, p. 68, et seq.

C. F. Stewart, Clerk.

(Here follow exhibits in evidence marked side folio pages 139 and 140.)

[fol. 141] And the court hereby certifies that the foregoing is the evidence and all of the evidence introduced by both the plaintiff and the defendant upon the trial of the above mentioned case, and thereupon the plaintiff by counsel tendered to the court and requested the court to give to the jury seven certain instructions in writing, to the giving of which and each of which the defendant by counsel objected, but the court overruled said objection and gave said instructions and each of them to the jury. To which action and ruling of the court the defendant by counsel at the time excepted. The said instructions so given to the jury on behalf of the plaintiff are in the words and figures following, to-wit:

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

Plaintiff's Instruction #1

The court instructs the jury that the owner of land, through or by which a natural stream of water flows in a natural channel, has a right to have the water of said stream to continue to flow through or by his land in its natural state and condition as it is wont to flow, and any person who wrongfully obstructs, diverts or changes the channel of such stream or the natural flow of the water therein, to the injury of such owner, is liable to such owner for such damages as may be sustained by such owner by reason thereof; and if you believe from the evidence in this case that the defendant, in grading and constructing its railroad, unlawfully cast into and filled up the channel of Slab Fork Creek with stone, dirt, timber or other debris, on the bank thereof opposite plaintiff's land, and thereby obstructed the channel of said stream and diverted the water thereof from its said natural channel and caused the same to flow over and upon plaintiff's [fol. 142] land, and to wash away and destroy plaintiff's land and fencing thereon, and the fruit trees, grass and other crops growing thereon, then the plaintiff is entitled to recover from the defendant such amount as you may believe from the evidence is necessary to

compensate him for the injuries thereby sustained by him for and during the period of five years next and preceding the institution of this suit, but the plaintiff is not entitled to recover in this action any amount for any such damages as he may have sustained more than five years prior to the date of the institution of this suit nor for any damage that he may have sustained since the institution of this suit.

Plaintiff's Instruction #2

The court further instructs the jury that in determining and arriving at the amount of damages to which the plaintiff is entitled, if any, you should take into consideration the deterioration in the value of the plaintiff's land, caused by such washing away of the same, during the period of five years next preceding the institution of this suit, the damages suffered by the plaintiff during that period on account of injury to and destruction of grass and other crops and the destruction of fruit trees and fencing and all money properly paid out and expended by the plaintiff in an effort to protect his land, fencing, soil, fruit trees, grass and other crops against such injury and destruction.

Plaintiff's Instruction #3

The court instructs the jury that the fact that the defendant had legally acquired that portion of the bed and channel of said stream into which it cast the dirt, stone, timber and other debris and owned the same as a part of its right of way for the construction of its said [fol. 143] railroad, and was not guilty of any negligence in the construction of its said railroad and did the same in the most approved manner, constitutes no defense of this action.

Plaintiff's Instruction #4

The court instructs the jury that if the floods, or any of them, which washed away and destroyed the plaintiff's land, fruit trees, fences grass or other crops, were extraordinarily high and were the result of unusual and unprecedented rains, and that such washing away and destroying of plaintiff's land, fruit trees, grass and other crops was due entirely and solely to such extraordinary flood or floods, and not in any way to the obstruction and diversion of said stream by the defendant, the plaintiff is not entitled to recover; but if you shall believe from the evidence in the case that the acts of the defendant in obstructing the channel of said stream and diverting the flow of the water therein augmented or accelerated the forces of such extraordinary flood or floods and thereby cooperated with such extraordinary flood or floods and contributed to the injury of plaintiff's land, fruit trees, fences, grass and other crops, then the fact that such flood or floods was extraordinarily high and resulted from unusual and unprecedented rains constitutes no defense to the plaintiff's action:

Plaintiff's Instruction #5

The court further instructs the jury that if the defendant relies upon the fact that the floods, or any of them, which injured the plaintiff were extraordinarily high and the result of unusual and unprecedented rains as a defense to this action, then the burden is on the defendant to establish such defense by showing to the [fol. 144] satisfaction of the jury that the injuries sustained by the plaintiff were due solely and entirely to the extraordinary height of such flood or floods and not due in any way to or caused by the obstruction placed in said stream by the defendant.

Plaintiff's Instruction #6

The court instructs the jury that if they believe from the evidence that the damage and injury complained of was due to and caused by the obstructions placed in said stream as alleged in the declaration in this case and as testified to by witnesses for the plaintiff, and was not in any way due to or caused by the operation of said railroad system by the United States Railroad Administration, then the fact that said railroad was operated and controlled by said railroad administration at the time the injuries or any of them occurred constitutes no defense to this action.

Plaintiff's Instruction #7

The court instructs the jury that if you believe from the evidence in this case that the defendant wrongfully obstructed said stream and diverted the waters thereof as charged in the declaration and testified to by the witnesses, and that such obstruction and diversion resulted in the injuries complained of, then the plaintiff was not required to build a wall or widen the channel of said stream for the protection of his land or property, and the fact that he did not do so constitutes no defense to this action.

And thereupon the defendant tendered to the court and requested the court to give to the jury Instruction #A in the words and figures following, to-wit:

"The court instructs the jury that the evidence is not sufficient [fol. 145] to sustain a verdict for the plaintiff and they must, therefore, find for the defendant."

But the court refused to give said Instruction #A, to which action and ruling of the court the defendant by counsel at the time excepted.

And thereupon the defendant by counsel tendered to the court and requested the court to give certain instructions in writing, to the giving of each of which the plaintiff by counsel objected, but the court overruled said objection as to Instructions Nos. 1, 2 and 3 and gave the same to the jury, to which action and ruling of the

court the plaintiff by counsel excepted. Said Instructions Nos. 1, 2 and 3 so given to the jury in behalf of the defendant are in the words and figures following, to-wit:

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Defendant's Instruction #1

The court instructs the jury that the burden of proof is on the plaintiff to show by a preponderance of affirmative evidence every fact necessary for a recovery by him. The burden of proof is on the plaintiff to show by such preponderance of the evidence not only the facts relied on to impose a liability on the defendant, but also the amount of the damages alleged to have been suffered by the plaintiff.

Defendant's Instruction #2

The court instructs the jury that in considering whether or not the Deepwater Railway Company improperly constructed its road bed, they are entitled to take into consideration whether there was any appreciable damage to the plaintiff's land due to the diversion of the waters of Slab Fork Creek between the time of the original construction of the road bed in 1906, or prior thereto, and the flood of 1918.

[fol. 146] Defendant's Instruction #3

The court instructs the jury that they must find for the defendant on that count of the declaration charging that on July 17th, 1919, the defendant entered on the land of the plaintiff and dug up and hauled away a quantity of earth, stone, soil, etc., and that the defendant is not liable for such acts.

But as to Instructions Nos. 4 to 13 inclusive so offered by the defendant the court sustained the objection of the plaintiff, to the giving of the same and declined and refused to give the same, or either or any of them to the jury, to which action and ruling of the court the defendant by counsel at the time excepted. Said Instructions Nos. 4 to 13 inclusive so offered by the defendant and refused by the court are in the words and figures following, to-wit:

Defendant's Instruction #4

The court instructs the jury that there is no liability on the defendant for any damages caused by floods occurring between December 28th, 1917, and March 1st, 1920, and they must find for the defendant for damages caused by floods occurring between these dates.

Defendant's Instruction #5

The court instructs the jury that under the evidence in this case there can be no recovery for damages caused by rocks and other

debris placed in the stream opposite plantiff's land, outside of the embankment of defendant, by the contractor who built defendant's road bed.

Defendant's Instruction #6

The court instructs the jury that the only duty resting upon the Deepwater Railway Company was to construct its embankment and [fol. 147] fill in such a proper and skillful manner as not to injure or damage the property of the plaintiff under such freshets as were to be reasonably anticipated, and the court instructs the jury that the defendant was within its rights in constructing such fill or embankment on its property along Slab Fork Creek, provided such embankment or fill would not, under conditions reasonably to be anticipated, cause the waters of Slab Fork Creek to injure the lands of the plaintiff.

Defendant's Instruction #7

The court instructs the jury that if they believe from the evidence that the Deepwater Railway Company, on or about the year 1904, in constructing its railroad bed, cast into and filled up the channel of the stream adjacent or near to the plaintiff's property, with stone, earth or any other material or substance so as to divert the waters of the stream and to cause the waters of the stream to overflow the land of the plaintiff in times of high water and wash away and destroy plaintiff's property on said land and to injure plaintiff's land, and if they further believe from the evidence that the said Deepwater Railway Company by deed dated the 22nd day of April, 1907, conveyed said road bed to the defendant, the defendant is not liable for the damages caused by the said acts of the Deepwater Railway Company and they shall find for the defendant as to any such damages, whether they occurred before or after the deed of April 22nd, 1907, above referred to.

Defendant's Instruction #8

The court instructs the jury that if they believe from tthe evidence that the damage to the plaintiff's land and property was caused by rocks, earth and other material deposited in or near the stream adjacent to or near to plaintiff's land by the Deepwater Railway Company in or about 1904, as alleged in the declaration, that said [fol. 148] road bed was constructed in accordance with the usual standards of engineering practice in use at the time, and that after the said obstructions were so placed in or near the stream by the said Deepwater Railway Company, said Deepwater Railway Company conveyed said road bed to the defendant, The Virginian Railway Company, and that the plaintiff made no complaint or objection to The Virginian Railway Company to said fill or obstructions prior to the flood of July 1919, the plaintiff cannot recover and they must find for the defendant.

Defendant's Instruction #9

The court instructs the jury that if they believe from the evidence that the damage to the plaintiff's land and property was caused by rocks, earth and other material deposited in or near the stream adjacent or near to plaintiff's land by the Deepwater Railway Company in or about 1904 as alleged in the declaration, and that after the said obstructions were so placed in or near the stream by the said Deepwater Railway Company, said Deepwater Railway Company conveyed said road bed to the defendant, The Virginian Railway Company, and that the plaintiff made no complaint or objection to said fill or obstructions prior to the flood of July 1919, the plaintiff cannot recover and they must find for the defendant.

Defendant's Instruction #10

The court instructs the jury that if they believe from the evidence that the plaintiff executed and delivered to the Deepwater Railway Company the deed of July 20th, 1904, and that the Deepwater Railway Company accepted said deed and acting thereunder built its road bed on the land conveyed thereby and diverted the course of the stream by erecting a part of its road bed partly in the stream, and that the plaintiff knew, or had a reasonable opportunity to know, the location of the road bed as actually erected and built, [fol. 149] and that thereafter in the year 1907 the Deepwater Railway Company conveyed said road bed to the defendant and the defendant took possession of said road bed, neither the Deepwater Railway Company nor the defendant were liable, after said embankment was constructed, to observe the action of the water or to protect the banks of the stream or to take other measures to prevent the encroachment of the stream on other neighboring land of the plaintiff, and they must therefore find for the defendant.

Defendant's Instruction #11

The court instructs the jury that if they shall believe from the evidence that the plaintiff conveyed to the Deepwater Railway Company for railway purposes the land which the plaintiff claims in this suit was changed in such manner as to divert the waters of Slab Fork and cast them upon his land; yet if they shall further believe from the evidence that the road bed and track of the defendant was built on such land in a manner which was in accordance with the approved standard of railroad construction, then although such construction might have diverted the waters of Slab Fork on to plaintiff's land, the defendant is not liable therefor.

Defendant's Instruction #12

The court instructs the jury that under the deed from the Deepwater Railway Company to the Virginian Railway Company of April 22nd, 1907, The Virginian Railway Company did not assume

any liability for, and is not liable for, the manner in which the road bed of the defendant was constructed, even if the jury believe from the evidence that such road bed was constructed by the Deepwater Railway Company so that the waters of Slab Fork Creek were diverted upon the plaintiff's land.

[fol. 150] Defendant's Instruction #13

The court instructs the jury that the defendant is not charged with the duty of anticipating an unusual or extraordinary flood or the results that might possibly follow therefrom and if they find from the evidence that the flood and consequent rise of water in Slab Fork Creek was the highest within the memory of any of the witnesses testifying, such flood and rise of water was so unusual and extraordinary that there was no obligation on the defendant to guard against its results, and the plaintiff cannot recover in this action if they further believe from the evidence that the defendant's embankment was such as would not cause the waters of Slab Fork Creek to damage the lands of the plaintiff in times of such ordinary high waters as might reasonably have been expected to flow down said creek.

And thereupon, after receiving the instructions of the court and hearing the arguments of counsel, the jury retired to their room to consider of their verdict and after some time returned to the court with a verdict in the words and figures following, to-wit:

"We, the jury, upon the issues joined between the plaintiff and defendant find for the plaintiff and assess his damages at the sum of $8,000.00.

T. W. Buchanan, Foreman."

And the jury was discharged in this cause and thereupon the defendant moved the court to set aside the verdict of the jury, because the court improperly received evidence offered by the plaintiff over the objection of the defendant, because of errors in instructions given for the plaintiff, because of refusing proper instructions offered by the defendant, because the verdict was contrary to the law and evidence, [fol. 151] and because the court improperly excluded competent evidence offered by the defendant. And the court not being advised of its decision upon said motion, took the same under advisement and at a later date, the court being advised of its decision upon said motion, overruled the same and entered judgment in favor of the plaintiff against the defendant in accordance with the said verdict.

And the defendant thereupon tenders this, its Bill of Exceptions #1, and prays that the same may be signed, sealed and saved to it and made a part of the record in this cause, which is accordingly done, said Bill of Exceptions being marked for the purpose of identification "Bill of Exceptions No. 1."

R. D. Bailey, Judge.

[fol. 152] In Circuit Court of Wyoming County

Clerk's Certificate

I, Geo. M. Farley, Clerk of the Circuit Court of said County, do certify that the foregoing petition, together with the certificate of M. P. Howard, thereto attached, was this day filed in my office in duplicate.

I further certify that a bond in the penalty of Five Hundred Dollars ($500.00), with security approved by me as sufficient, and conditioned to secure the payment of the expense of the preparation and indexing of the recording fees, for filing said petition and making and certifying necessary orders, costs of transmission and returning of the record, and making of the transcript of the record in the above styled cause, has been executed and filed in my said office.

Given under my hand and the seal of the Court, this the 1st day of February, 1924.

Geo. M. Farley, Clerk. (Seal of Circuit Court, Wyoming County, West Virginia.)

(4170)

Supreme Court of the United States

On Petition for Writ of Certiorari to the Circuit Court of Wyoming County, State of West Virginia

Order Granting Petition for Certiorari—Filed Dec. 15, 1924
1924

On consideration of the petition for a writ of certiorari herein to the Circuit Court of Wyoming County, State of West Virginia, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(5917)